Supreme Court, U.S.
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No. 92-472

In The

Supreme Court of the United States

October Term, 1992

BRUCE E. HORNSBY,

Petitioner,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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LIST OF ALL PARTIES TO THE PROCEEDING BELOW

1. Bruce E. Hornsby, petitioner

2. St. Louis Southwestern Railway Company,[1] respondent

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[1] Pursuant to Sup.Ct.R. 29.1, St. Louis Southwestern Railway Company is more than 99 percent owned by Southern Pacific Transportation Company; Southern Pacific Transportation Company is wholly owned by SPTC Holding, Inc., which in turn, is wholly owned by Rio Grande Industries, Inc. Rio Grande Industries is 71.25 percent owned by Anschutz Corporation, whose stock is privately held. The remainder of Rio Grande Industries is owned by Morgan Stanley Group, Inc. and affiliates (19 percent), Nippon Yusen Kaisha (5 percent), and by various investors (4.75) percent. The following companies are partially owned (in the percentages noted) either directly or indirectly by Southern Pacific Transportation Company:

Central California Traction Co. (33.3%)
The Ogden Union Ry. & Depot Co. (50%)
Portland Terminal R.R. Co. (20%)
Sunset Ry. Co. (50%)
Trailer Train Co. (7.16%)
The Alton & Southern Ry. Co. (50%)
Arkansas & Memphis Ry. Bridge and Terminal Co. (66.6%)
Kansas City Terminal Ry. Co. (8.3%)
Southern Illinois and Missouri Bridge Co. (40%)
Terminal R.R. Association of St. Louis (12.5%)

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RESTATEMENT OF THE CASE

St. Louis Southwestern Railway Company is dissatisfied with the statement of the case submitted by Petitioner, Bruce Hornsby, and submits the following corrections and additions to the statement of the case submitted.

Bruce Hornsby, in his original complaint filed in the district court, sought a declaration that his termination violated 45 U.S.C. §60, a criminal statute. Additionally, he requested that he be reinstated, that an injunction be entered essentially reversing the disciplinary action that

had been taken against him, and in conjunction with those two remedies he requested that the court grant him back pay and benefits.

St. Louis Southwestern Railway Company is a railway carrier subject to the provisions of the Railway Labor Act, 45 U.S.C. §151 et seq. Hornsby, a conductor for the railroad, was covered under the collective bargaining agreement extant between St. Louis Southwestern Railway and the United Transportation Union.

St. Louis Southwestern Railway did not simply discharge Hornsby after a jury verdict was returned in the Broome case in which Hornsby testified. The facts are these. The railroad, pursuant to the provisions of the collective bargaining agreement with UTU and in accord with the Railway Labor Act, gave notice to Hornsby of the charges against him. The railroad has twenty (20) days after an operating officer receives knowledge of a potential violation of the work rules to notify Hornsby of the railroad's intent to investigate in order to preserve potential discipline under the collective bargaining agreement. Otherwise, the right to investigate and potentially discipline the employee is lost under the collective bargaining agreement's time restrictions.

Hornsby was notified of the investigation within twenty (20) days after an operating officer learned of the potential rules violation. This happened to occur by the operating officer being cross-examined in the Broome case in which Hornsby had testified. It was at this point that an operating officer first learned that Hornsby had provided testimony and sworn statements in direct

conflict with a written report he had filed with the railroad concerning the Broome accident in 1982. Based on this information learned at the Broome trial, the railroad followed the collective bargaining agreement's requirements involving notice to Mr. Hornsby.

Hornsby, represented in a hearing that lasted eight (8) days by his union representative, took the position that his Form 2611 filled out in 1982 was simply a mistake. The railroad superintendent, after reviewing the transcript of the eight (8) day hearing, decided to terminate Hornsby. The superintendent testified at the trial that Hornsby was terminated because there was a conflict between the information Hornsby furnished the railroad in 1982 and what he testified to in 1987 and there was no satisfactory explanation of the inconsistency between his report filed with the railroad and his later testimony and sworn statements. This was consistent with the letter that was received by Mr. Hornsby advising him of his termination. The letter of termination stated that Hornsby was dishonest and immoral when he testified on April 22, 1987, and gave information that was in direct conflict with a personal injury report filed on April 21, 1982. It was found that he had been dishonest in violation of applicable rules governing employees at the railroad and he was terminated.

The decision was appealed pursuant to the provisions of the Railway Labor Act, 45 U.S.C. §151 et seq. and ultimately heard by Special Board of Adjustment 100. This board, convened pursuant to the compulsory arbitration provisions of the Railway Labor Act, 45 U.S.C. §153 Second, found that Hornsby had been intentionally

dishonest. The Adjustment Board concluded, after a thorough review of the railroad's investigation, that there was substantial evidence supporting the view that Hornsby was dishonest and violated the railroad's rules. The Board found that the railroad was justified in terminating Hornsby for his failure to be candid and truthful concerning the Broome injury. Hornsby took no steps to set aside the Board of Adjustment award pursuant to the provisions of the Railway Labor Act, namely 45 U.S.C. §153 First (q). Rather, Hornsby filed the action in the district court seeking injunctive relief.

Hornsby's statement of the case describes in detail the seating arrangement in the locomotive and Hornsby's contention he was clearly in a position to see the accident that occurred to his fellow trainman, Mr. Broome. (See pages 4 and 5 of the Petition for Certiorari). The District Court found with respect to these contentions that Hornsby advised his supervisor, Ashley Spears, that none of the crew had seen the accident on the evening in question. Consistent with what he told his supervisor on the night of the occurrence, Hornsby later that evening upon his arrival at Jonesboro, Arkansas filled out his accident form stating that he did not see the accident. Hornsby's report details that Brakeman Broome said he injured his back while trying to line a cross-over switch at the roadhouse.

The District Court also found that Hornsby claimed in statements he gave in 1986 to Rick Rosen, a lawyer retained by Broome to represent him in the personal injury lawsuit, and to John Gunn, the railroad's FELA defense attorney in the case, that he was an eyewitness to Broome's accident. Thereafter, on April 22, 1987, he

appeared at the Broome trial in Illinois and testified that he saw the accident.

Clearly, his accident form filled out by him, as well as his own admission to his supervisor, is inconsistent with the testimony that he saw the accident.

The District Court found that the decision to investigate Hornsby was made in order to determine the cause of or reason for the discrepancies between what Hornsby said in 1982 and what he testified to in 1987.

The District Court, after a three-day trial, found in behalf of the railroad. This was preceded by a ruling on the part of the district court that Hornsby's claim was not an ordinary FELA action. The District Court found that Hornsby had not cited it to any persuasive authority for the proposition that he was entitled to a trial by jury and, inasmuch as equitable matters are typically for the court's consideration, the court granted the railroad's motion to strike the jury trial.

The Eighth Circuit, in reviewing a number of points made on appeal by Mr. Hornsby, affirmed the district court decision in all of its particulars. One judge on the panel dissented on the basis that he felt it was error for the district court to strike the plaintiff's jury trial demand. It is upon this basis that Hornsby now seeks certiorari for this Court to review that determination.

SUMMARY OF THE ARGUMENT

The Eighth Circuit decision is not in conflict with a decision of any United States Court of Appeals on the

same matter and the decision has not decided a federal question in a way that conflicts with other applicable decisions of this Court. The Supreme Court has recognized that back pay can be awarded as an adjunct to injunctive relief and has stated in a case decided as recently as 1992 that back pay is equitable in nature, rather than legal.

ARGUMENT

The relief sought by Mr. Hornsby was a declaration that his termination violated 45 U.S.C. §60, a criminal statute, which essentially provides that it is a violation of the criminal law for a railroad to discharge or otherwise discipline any employee for furnishing voluntarily information to a person in interest facts incident to the injury or death of an employee. Punishment by a fine of not more than $1,000.00 or imprisonment for not more than one (1) year is the penalty. In addition to that declaration, Hornsby sought reinstatement, back pay and benefits, and an injunction.

St. Louis Southwestern Railway submits the relief available pursuant to §60, as recognized by the Fifth Circuit Court of Appeals and the Ninth Circuit Court of Appeals, is equitable. The Fifth Circuit in *Hendley v. Central Georgia Railroad*, 609 F.2d 1146 (5th Cir. 1980), held that a district court has jurisdiction to enjoin any proceeding violative of §60. The *Hendley* court held that a federal district court had jurisdiction to determine whether a disciplinary hearing is brought for purposes violative of §60 or whether the railroad is attempting to

discipline an employee for violation of lawful company rules. *Id.* at 1153.

The Fifth Circuit has also held in *Gonzalez v. Southern Pacific Transportation Co.*, 773 F.2d 637 (5th Cir. 1985), that a district court can grant injunctive relief if an employee shows that he has been discharged for furnishing information to an interested person. *Id.* at 642.

The Ninth Circuit in *Lewy v. Southern Pacific Transportation Co.*, 799 F.2d 1281 (9th Cir. 1986), held that §60 does not create a private cause of action for compensatory damages. The Ninth Circuit typified *Gonzalez* and *Hendley* to hold that §60 provides federal statutory authority sufficient to overcome on a limited basis the preclusive effect of the Railway Labor Act and authorized courts to enjoin ongoing disciplinary proceedings, order reinstatement, and award back pay to employees who have been discharged or disciplined in retaliation for furnishing information to potential FELA plaintiffs or other similarly interested persons. The Ninth Circuit also held that §60's language did not support an interpretation that compensatory damages were available. At most, §60 authorized courts to exercise equitable jurisdiction over retaliation claims and thus award back pay, but not additional money damages. *Id.* at 1293.

The point Mr. Hornsby makes in his Petition in this Court is that he believes if someone requests back pay, presumably in any lawsuit, then the Seventh Amendment dictates a jury trial. The troubling aspect of this argument is that it ignores the necessary inquiry of whether Hornsby's claim for lost wages is to be treated as restitutionary incident to an order reinstating him to a job from which

he has been terminated allegedly in violation of §60. This Court has clearly mandated that such an inquiry must be made. *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990).

The Supreme Court has very recently reaffirmed the examination that a district court makes in order to determine whether or not there is a jury trial right. In *Wooddell v. International Brotherhood of Electrical Workers*, 502 U.S. ___, 112 S.Ct. ___, 116 L.Ed.2d 419 (1991), the Court stated the following:

> To determine whether a particular action will resolve legal rights, and therefore give rise to a jury trial right, we examine both the nature of the issues involved and the remedies sought. (Citations omitted). First, we compare the statutory action to 18th-Century actions brought in the Courts of England prior to the merger of the courts of law and equity. Second, we examine the remedies sought and determine whether it is legal or equitable in nature. (Citations omitted). The second inquiry is the more important in our analysis. (Citations omitted). *Id.* at 427.

In *Wooddell*, the Court in describing *Terry*, had the following to say:

> Generally, an award of money damages was the traditional form of relief offered in the courts of law. *Terry, supra*, at 570, citing *Curtis v. Loether*, 415 U.S. 189, 196 (1974). Because we found that the damages sought were neither analogous to equitable restitutionary relief, *Tull*, 481 U.S. at 424, nor incidental to or intertwined with injunctive relief, Ibid., we concluded that the remedy had none of the attributes required for an exception to the general rule, and thus found

> the remedy sought to be legal. *Terry, supra,* at 570, 571. *Id.* at 427.

In *Wooddell,* the union member petitioner contended that his injunctive relief was incidental to his damages and not vice-versa. The damages sought in *Wooddell* were for pay for jobs to which the union failed to refer Mr. Wooddell. *Id.* at 428.

In this case, the damages sought by Hornsby are totally incidental to the injunctive relief. Hornsby's claim for lost wages is restitutionary and only would follow if he were reinstated. This analysis was recently explained by the Court in *Terry.*

> Second, a monetary award "incidental to or intertwined with injunctive relief" may be equitable. *Tull, supra,* at 424. See *E.G. Mitchell v. Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 291-292 (1960). (District Court had power, incident to its injunctive powers, to award back pay under the Fair Labor Standards Act. Also back pay in that case was restitutionary). Because respondents seek only money damages, this characteristic is clearly absent from this case. *Terry,* 494 U.S. at 571.

Petitioner Hornsby's claim was a request that the court reverse any discipline that had been assessed against him as being in violation of §60 of the FELA. The primary remedy he sought was an injunction. Any back pay request was incidental to this injunction request.

In *Bowen v. Massachusetts,* 487 U.S. 879 (1988), this Court once again recognized its long line of cases recognizing a distinction between an action at law for damages and an equitable action for specific relief which could

include providing for the reinstatement of an employee with back pay. *Bowen* clearly rejected the proposition that the mere fact that one party may have to pay money to another as part of a judicial remedy is sufficient reason to characterize such relief as "money damages" entitling one to a jury trial. *Id.* at 893-894.

The Eighth Circuit properly analyzed this very issue as demonstrated in footnote 3 of the decision in this case. (Appendix page 6a).

The dissenting judge on the panel relied on *Tull v. United States*, 481 U.S. 412 (1987), and *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). *Tull* acknowledges that a court in equity can award monetary restitution as an adjunct to injunctive relief. *Tull*, 481 U.S. at 424. *Franklin*, an interpretation of Title IX remedies, does not appear to be specifically on point. *Franklin* does, however, flatly state that back pay is equitable in nature, rather than legal, as argued by the dissent in the Eighth Circuit and by the petitioner in this matter. *Franklin*, 117 L.Ed.2d at 223.

Reliance upon decisions concerning the rights to jury trials pursuant to 42 U.S.C. §1981 and §1983 are troubling. Both of those statutes have been interpreted to make available damages attributable to emotional distress, medical expense, other compensatory damages, and punitive damages.

Also not dispositive is any reliance upon jury trials granted under the Age Discrimination in Employment Act. In *Lorillard v. Pons*, 434 U.S. 575 (1978), cited and relied upon to some extent by the dissent in the lower court, this Court held that jury trials are available in age

discrimination in employment suits relying on prior statutory interpretation of the Fair Labor Standards Act, relief under the Age Discrimination in Employment Act being modeled after relief under the Fair Labor Standards Act. Relief provisions of the Age Discrimination in Employment Act now provide that a party can sue for both legal and equitable remedies, 29 U.S.C. §626(c)(1), and there is an express right to a trial by jury of any fact issue, regardless of whether equitable relief is sought. 29 U.S.C. §626(c)(2). It is not surprising in light of this fact that jury trials are granted in age discrimination lawsuits.

Finally, it should be noted that Mr. Hornsby never requested in his prayer for relief a claim for compensatory damages. The dissent to the Eighth Circuit decision noted that Hornsby did not request any compensatory damages, but limited his request to back pay and benefits. (Pet. App. 12a and 13a).

CONCLUSION

For the foregoing reasons, respondent respectively suggests that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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